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LAWLER et al. v. FRENCH et al.

June 15, 1905.

[51 S. E. 180.]

DEED OF TRUST—RIGHT TO SELL—NONPAYMENT OF TAXES—SETTING ASIDE SALE—CONTENTIONS NOT MADE IN BILL.

1. The right under a deed of trust to secure a loan, authorizing foreclosure if the borrower neglect to pay his taxes within ten days after they are due, is not waived by failure to sell till after the taxes have been due for three years, and the lender has paid them.
2. The contentions in a suit to set aside a sale under a trust deed given to secure a loan by an association that the trustees made the sale without a written request from the association, and that therefore it was unlawful, and that in fact the instrument of security was a mortgage, because one of the trustees was a stockholder, and so entitled the maker to redeem, not having been made in the bill, and no facts having been alleged on which they can be based, cannot be considered.

CHESAPEAKE & O. RY. v. WHITLOW.

June 15, 1905.

[51 S. E. 182.]

TRIAL—INSTRUCTIONS—CONSISTENCY—RAILROADS—CARE OF RIGHT OF WAY ACCUMULATIONS OF FILTH — ACTIONS FOR INJURY — BURDEN OF PROOF — INSTRUCTIONS.

1. In an action against a railroad for permitting filth to accumulate upon its right of way, thereby causing malaria in plaintiff's family, a charge to find for defendant if the sickness may have resulted from other causes than from stagnant water on the right of way, unless such stagnant water was the principal and substantive cause of the injury complained of, in which case they should find for plaintiff, even though other causes may have contributed to a lesser extent, was contradictory of a charge that if plaintiff by his own negligence permitted stagnant water to remain upon his premises which contributed to cause the sickness complained of, the jury must find for defendant, and inconsistent with an instruction to find for defendant if it used reasonable care to keep its right of way drained, and thus gave rise to an error which could not be cured by other instructions.

2. In an action against a railroad for permitting filth to accumulate upon its right of way and thereby causing malaria in plaintiff's family, where there was evidence that plaintiff's own premises were in an unsanitary condition which might have caused the illness complained of, it was incumbent on plaintiff to show by a preponderance of evidence that such illness was caused by the railroad's negligence, and it was insufficient to show that it might as well have been caused by defendant's negligence as by his own.